

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Ruth Y. Goldway, Chairman;
Robert G. Taub, Vice Chairman;
Mark Acton;
Tony L. Hammond; and
Nanci E. Langley

Market Dominant Product Prices
First-Class and Standard Mail
Discover Financial Services

Docket No. MC2011-19

Market Dominant Product Prices
Discover Financial Services (MC2011-19)
Negotiated Service Agreement

Docket No. R2011-3

ORDER APPROVING PROPOSED AMENDMENT TO DISCOVER FINANCIAL
SERVICES 1 NEGOTIATED SERVICE AGREEMENT

(Issued May 17, 2013)

I. INTRODUCTION

The Postal Service seeks to amend its market dominant negotiated service agreement with Discover Financial Services (DFS).¹ For the reasons discussed below, the Commission approves the proposed amendment.

¹ See Notice of the United States Postal Service of Filing of Contract and Supporting Data and Request to Add Discover Financial Services Negotiated Service Agreement to the Market-Dominant Product List, January 14, 2011, Attachment B (Agreement). The Commission approved the Agreement on January 19, 2011. See Docket Nos. MC2011-19 and R2011-3, Notice and Order Concerning Addition of Discover Financial Services Negotiated Service Agreement to the Market Dominant Product List, January 19, 2011 (Order No. 694).

II. BACKGROUND

On March 8, 2013, the Postal Service filed a letter with the Commission giving notice of “a minor amendment” to the Agreement.² The Letter describes a decision by DFS to “upgrade a small portion of its First-Class Mail volume to Priority Mail” and expresses concern that this decision could result in DFS failing to meet the adjusted revenue threshold under the Agreement. Letter at 1.

The Proposed Amendment modifies the Agreement to allow DFS to add some portion of its Priority Mail volume in the calculation of the adjusted revenue threshold under the Agreement. *Id.* The Proposed Amendment does not contemplate including Priority Mail revenue in the calculation of the adjusted revenue threshold, nor would Priority Mail be eligible for a discount under the Agreement.³ Instead, the Priority Mail volume for a contract year would be multiplied by the average First-Class Mail per-piece postage rate for that contract year. Letter at 1. The Postal Service asserts that the Proposed Amendment has the advantage of ensuring that DFS “will not be penalized” for its decision to send Priority Mail, which provides a higher per-piece contribution to the Postal Service than First-Class Mail. *Id.* at 2.

On March 14, 2013, the Commission gave notice of the Proposed Amendment, appointed a Public Representative, and established a due date for comments of March 27, 2013.⁴ On March 21, 2013, the Commission issued Chairman’s Information Request No. 3, requesting that the Postal Service provide additional information

² Letter from Brandy A. Osimokun, Attorney, Postal Service, to Shoshana M. Grove, Secretary, Postal Regulatory Commission, March 8, 2013 (Letter). The proposed amendment is included as an attachment to the Letter (Proposed Amendment).

³ The Postal Service repeatedly emphasizes that DFS would not receive a rebate on Priority Mail volume under the Proposed Amendment. See Response of the United States Postal Service to Public Representative Motion for Issuance of Commission Information Request, March 28, 2013, at 2 (USPS Response to PR Motion); Response of the United States Postal Service to Chairman’s Information Request No. 3, March 26, 2013, question 9 (Response to CHIR No. 3); and Response of the United States Postal Service to Public Representative’s and Valpak’s Comments, April 11, 2013, at 2 (Postal Service Response).

⁴ Notice and Order Concerning Contract Amendment to Discover Financial Services Negotiated Service Agreement, March 14, 2013 (Order No. 1676).

concerning the Proposed Amendment.⁵ The same day, the Public Representative filed a motion for the issuance of a Commission Information Request.⁶ The Postal Service filed a response to the PR Motion on March 28, 2013. See USPS Response to PR Motion.

On March 26, 2013, the Postal Service provided its response to CHIR No. 3 and, in an unorthodox filing, DFS submitted its own comments in response to CHIR No. 3.⁷ That day, the Commission issued Chairman's Information Request No. 4.⁸ The Postal Service responded to CHIR No. 4 on April 1, 2013.⁹

III. COMMENTS

Four parties—Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. (Valpak), the Public Representative, DFS, and the Postal Service—submitted comments on the Proposed Amendment. Their comments are discussed in this section.

⁵ Chairman's Information Request No. 3, March 21, 2013 (CHIR No. 3).

⁶ Public Representative Motion for Issuance of Commission Information Request, March 21, 2013 (PR Motion). Because much of the information the Public Representative requested was provided by the Postal Service in its Response to CHIR No. 3 and Response to CHIR No. 4, and by the DFS Comments, the PR Motion is denied as moot.

⁷ Response to CHIR No. 3; Comments of Discover Financial Services, March 26, 2013 (DFS Comments). Counsel for DFS submitted a notice which included a letter (DFS Letter) previously sent to the Chairman, dated April 29, 2013, with a copy to each Commissioner. See Notice of Discover Financial Services, May 1, 2013. In the letter, DFS addresses matters in this and another Commission proceeding. On May 7, 2013, the Public Representative moved to file a reply to the DFS Letter. Motion for Leave to Reply to the Ex Parte Comments of Discover Financial Service, May 7, 2013, (Public Representative Motion). The Public Representative also filed a reply. See Public Representative Response to the Ex Parte Communications of Discover Financial Services, May 7, 2013 (Public Representative Reply). The Public Representative Motion is denied. In reviewing the record in this proceeding, the Commission made no use of the DFS Letter or the Public Representative Reply and did not rely on them in any way.

⁸ Chairman's Information Request No. 4, March 26, 2013 (CHIR No. 4).

⁹ Response of the United States Postal Service to Chairman's Information Request No. 4, April 1, 2013 (Response to CHIR No. 4).

Valpak. Valpak first address the performance of the Agreement to date.¹⁰ Valpak summarizes the results of the FY2012 ACD, including the Commission’s finding that the Agreement is inconsistent with 39 U.S.C. § 3662(c)(10), and advises the Commission to terminate the entire Agreement if contract year 2 also shows a net loss for the Postal Service. *Id.* at 2-3. Second, Valpak argues that 39 U.S.C. § 3642 prevents the Commission from approving a modification to the Agreement that would create “a market dominant product which relies on income from competitive products.” *Id.* at 4-5. Valpak warns that if the Commission approves the Proposed Amendment, it will establish a precedent that will allow future negotiated service agreements to include both competitive and market dominant products. *Id.* at 5. Third, Valpak objects to the procedural approach taken by the Postal Service. Acknowledging that the Commission’s rules do not specifically establish procedures for amendments to negotiated service agreements, Valpak nevertheless takes issue with what it believes to be the Postal Service’s failure to provide public notice of the amendment 45 days before it is implemented, consistent with 39 C.F.R. § 3010.41. *Id.* at 6-7. Valpak also states that it is unclear to which contract years the Proposed Amendment would apply. *Id.* at 6 n.2.

Valpak concludes by arguing that the Proposed Amendment is a “retroactive, after-the-fact” attempt to include types of mail not contemplated by the original Agreement that would set a “terrible precedent” and would not assist the Commission in developing a methodology for calculating the net benefit of negotiated service agreements. *Id.* at 8.

Public Representative. The Public Representative urges the Commission to evaluate the amended Agreement as a whole and to reject the amended Agreement because it does not meet the requirements of 39 U.S.C. 3622(c)(10).¹¹

¹⁰ Valpak Direct Marketing Systems, Inc. and Valpak Dealers’ Association, Inc. Comments on Contract Amendment to Discover Financial Services Negotiated Service Agreement, April 2, 2013 (Valpak Comments).

¹¹ Public Representative Comments, April 4, 2013, at 3-4 (PR Comments).

The Public Representative argues that the Proposed Amendment makes the Agreement even more likely to reduce the net contribution to the Postal Service. *Id.* at 4. He acknowledges that this argument sounds counterintuitive, given that DFS intends to shift some of its First-Class Mail to a class of mail with a generally higher contribution (Priority Mail). *Id.* at 4. Nevertheless, he reasons that the Proposed Amendment makes it easier for DFS to earn rebates and that the rebates should be rationally related to desired behavior. *Id.* He concludes that counting Priority Mail toward meeting the adjusted revenue threshold further decouples DFS's rebate or penalty under the Agreement from its decisions about the class and volume of mail it sends. *Id.* at 4-5. He calculates that, if DFS wished to avoid a penalty resulting from a decline in DFS Eligible First-Class Mail of 1 percent, it could simply spend an additional \$3.1 million in Standard Mail rather than spending approximately \$11.4 million on an upgrade to Priority Mail. *Id.* at 5. It could also choose to simply terminate the Agreement. *Id.* at 7. The Public Representative posits that if DFS is "economically rational, its motive for paying such a high premium for using Priority Mail has to be unrelated to the risks and rewards built into the original NSA." *Id.* at 5.

Similarly, the Public Representative argues that the Proposed Amendment (like the original Agreement itself) rewards DFS for sending Priority Mail it would have sent even in the absence of the Proposed Amendment. *Id.* at 7. He recites the analysis of the Agreement in the FY 2012 ACD, arguing that DFS's elasticities would have to be many times higher than the average class elasticities in order for the Agreement to have any effect on DFS's behavior. *Id.* at 8-10.

The Public Representative also asserts that the Proposed Amendment impermissibly mixes market dominant and competitive products. *Id.* at 12. He states that "the viability of the PAEA" depends on maintaining a wall between competitive products and market dominant products. *Id.* He expresses concerns about the Proposed Amendment's compliance with the PAEA and the possibility that it creates a tying arrangement prohibited under section 1 of the Sherman Act (15 U.S.C. § 1). *Id.*

Finally, the Public Representative again urges the Commission to require the Postal Service to explain fully the DFS own-price elasticities it uses to forecast volume under the Agreement. *Id.* at 13-14.

DFS Comments. DFS characterizes the Proposed Amendment as an attempt by DFS and the Postal Service to respond fairly to DFS's decision to send a certain type of credit card to new Discover customers using Priority Mail instead of First-Class Mail. DFS Comments at 1-2. DFS contends that the effect of the Proposed Amendment on the Agreement is "*de minimis*" because it involves less than 1 percent of the DFS Eligible First-Class Mail volume. *Id.* at 1. However, it also argues that the Proposed Amendment is a necessary means to ensure that DFS reaches the revenue threshold for contract year 3.¹² DFS Comments at 3.

DFS repeatedly asserts that, due to its decision to send some credit cards using Priority Mail, the Agreement now serves to "effectively penalize Discover because it is stretching itself to try new and innovative postal products." *Id.* at 3, 4, 5. It frames the intent of the Agreement as an attempt to "make the Postal Service whole" by compensating for the diversion of mail out of the First-Class Mail stream and into electronic delivery. *Id.* at 2, 4. It asserts that the Agreement was never intended to address a situation in which volume moves from First-Class Mail to the "more profitable" Priority Mail. *Id.* at 2. It urges the Commission to approve the Proposed Amendment in order to avoid providing the Postal Service with a "windfall" (presumably this refers to the Agreement's penalty provision) and sending "the wrong message at the wrong time to the mailing community about innovation." *Id.* at 3-4, 5.

Postal Service Response. In response to the comments of Valpak and the Public Representative, the Postal Service states that the "sole purpose" of re-opening this docket is to determine whether the Proposed Amendment complies with 39 U.S.C.

¹² DFS incorrectly states the revenue threshold for contract year 3 as "25% above its baseline threshold." *Id.* at 3. Under the terms of the Agreement, the revenue threshold for contract year 3 is "the Baseline Revenue plus twenty percent." Agreement at 2.

§ 3622(c)(10)(A).¹³ It is the Postal Service’s position that the Proposed Amendment does not alter the Commission’s original analysis of the Agreement. *Id.* Instead, the Proposed Amendment protects DFS from “being penalized for using a product that, in the long run, provides more revenue and contribution to the net finances of the Postal Service.” *Id.* at 4. The Postal Service emphasizes the increased contribution from Priority Mail, but states that increased contribution “would be an added, but ancillary benefit, which has nothing to do with the NSA.” *Id.* at 6. It maintains that the Proposed Amendment would only allow it to pay rebates on actual First-Class Mail and Standard Mail volumes, meaning that the rebate is directly linked to the volume of First-Class and Standard Mail, not Priority Mail. *Id.* at 5.

The Postal Service argues that the Commission approved the Agreement not primarily on the basis that it would improve the net financial position of the Postal Service, but because it would allow the Postal Service to enhance its knowledge of methods for slowing the decline in First-Class Mail volume. *Id.* at 4. It asserts that this Agreement will help it develop a better methodology for evaluating similar negotiated service agreements and that any knowledge gained in the course of the Agreement will make the Postal Service “better off in the long run.” *Id.* at 7, 8.

The Postal Service also addresses Valpak’s and the Public Representative’s concerns about mixing market dominant and competitive products. It states that the intent of the Proposed Amendment is not to create a product that is listed as both a competitive product and a market dominant product and that it has not requested that the amended Agreement be treated differently than other market dominant products. *Id.* at 9. The Postal Service argues that the Proposed Amendment violates neither the Sherman Act nor 39 U.S.C. § 3622(c)(10)(B), because there is no material effect on competition and DFS’s access to the rebate on First-Class Mail and Standard Mail is not

¹³ Postal Service Response at 3. The Postal Service Response was accompanied by a Motion of the United States Postal Service for Leave to File Response to Comments of Valpak and the Public Representative, April 11, 2013, noting that the Commission did not specify a procedure for reply comments in Order No. 1676 and asking for an opportunity to reply to criticism of the Proposed Amendment. That motion is granted.

conditioned on sending Priority Mail. *Id.* at 9-10. The Postal Service adds that DFS's desire to send Priority Mail is essentially a set of "independent business decisions not incentivized by the Amendment." *Id.* at 10.

Finally, the Postal Service asserts that, as there are no Commission rules that apply specifically to amendments to market dominant negotiated service agreements, Valpak and the Public Representative cannot fairly claim that the Postal Service has failed to follow the proper procedures. *Id.* at 10-11.

Public Representative Reply. In reply to the Postal Service's Response, the Public Representative argues that the purpose of a negotiated service agreement is "to change the behavior of the mailer contracted with by offering that mailer discounts or rebates if it changes its behavior in the way targeted."¹⁴ He views any rebates that do not cause a change in mailer behavior as "simply a gift." *Id.*

In the Public Representative's view, the Postal Service has conceded that the amended Agreement will have no effect on DFS's mail volume, which leaves only "the interests of science" as a potential justification. *Id.* at 2-3. In his assessment, 39 U.S.C. § 3622(c)(10) allows the Postal Service to enter into a negotiated service agreement only if the agreement either "improve[s] the Postal Service's operations" or "increase[s] net contribution," not in the interests of learning more about the operation of market dominant negotiated service agreements. *Id.* at 4.

IV. COMMISSION ANALYSIS

The Proposed Amendment raises several issues, including (1) whether the Proposed Amendment requires 45-day advance notice; (2) whether 39 U.S.C. § 3642 prohibits the Proposed Amendment; (3) whether the Agreement, as amended, creates a new product; (4) whether the Proposed Amendment results in a cross-subsidy of a competitive product by market dominant products; (5) the effective period of the

¹⁴ Public Representative Reply to Postal Service Response to Comments, April 16, 2013, at 1 (PR Reply). The PR Reply was accompanied by a Motion for Leave to Reply to the Postal Service's Ad Hoc Response, April 16, 2013, asserting that the Postal Service Response introduced new facts and additional confusion that merit a reply. That motion is granted.

Proposed Amendment; (6) the proper manner for filing an amendment to a market dominant negotiated service agreement; and (7) the effect of the Proposed Amendment on the existing data collection plan. Each of these issues is addressed in turn.

A. 45-Day notice not required

Citing 39 C.F.R. § 3010.41, Valpak argues that the Postal Service should have submitted the Proposed Amendment to the Commission for review 45 days before the effective date of the Proposed Amendment. Valpak Comments at 7. Valpak's reliance on section 3010.41 is misplaced, because that section, like all of 39 C.F.R. 3010 subpart D, only applies to notices of rate adjustments relating to market dominant negotiated service agreements.

The Agreement is a market dominant negotiated service agreement that was appropriately filed and considered under the procedures set forth in 39 C.F.R. 3010 subpart D. See Order No. 694 at 11-16. As a result of that proceeding, the Agreement was added to the market dominant product list as a separate product. The Proposed Amendment has a limited effect, namely, to substitute, on a one-for-one basis, Priority Mail volumes for a "small portion"¹⁵ of First-Class Mail volumes for purposes of calculating DFS's adjusted revenue threshold. The Proposed Amendment uses DFS's average per-piece revenue for First-Class Mail for that purpose, not the greater per-piece revenue generated by DFS's Priority Mail volumes.

The Proposed Amendment does not alter the per-piece amount of the rebate available to DFS for First-Class Mail or Standard Mail, the penalty for noncompliance, or the amount of the revenue threshold or the adjusted revenue threshold under the Agreement. It does not provide a discount on DFS's Priority Mail volumes. Nor does it foreclose DFS from using First-Class Mail, Standard Mail, or some combination of the two, to the exclusion of Priority Mail, to reach the adjusted revenue threshold and qualify for rebates. As the Postal Service observes, the effect of the Proposed Amendment is

¹⁵ Postal Service Response at 1.

“to make the third year threshold neutral as to the shift of any and all DFS eligible First Class Mail to Priority Mail.” Response to CHIR No. 3, question 1(a).

Given the limited nature of the Proposed Amendment, the Commission finds that the Proposed Amendment does not constitute a rate adjustment. Accordingly, neither 39 U.S.C. § 3622(c)(10) nor 39 C.F.R. 3010 subpart D applies.

B. The Agreement, as amended, is not a new product

Valpak argues that the Agreement, as amended, creates a hybrid competitive and market dominant product prohibited by 39 U.S.C. § 3642. Valpak Comments at 4-5. Section 3642 authorizes the addition, removal, and transfer of products to, from, and between the market dominant and competitive product lists. The Agreement was added to the market dominant product list pursuant to Commission regulations implementing section 3642. See 39 C.F.R. part 3020; see *also* Order No. 694. The Postal Service does not propose to transfer the Discover Financial Services 1 product to the competitive product list or to remove the product from the Mail Classification Schedule (MCS). See Postal Service Response at 9. The Commission is not persuaded that, given its limited purpose and effect, the Proposed Amendment so alters the Agreement as to constitute a new product.

Valpak contends that “[t]he NSA cannot be a market dominant product which relies on income from competitive products.” Valpak Comments at 5. The Agreement, as amended, does not rely on income from a competitive product. The Proposed Amendment does not alter the definition of “Eligible Mail” nor does it modify the manner in which rebates and penalties are calculated. See Response to CHIR No. 3, Attachment C. The only change is to the method for calculating whether DFS has met the adjusted revenue threshold if DFS shifts some volume from First-Class Mail to Priority Mail. To that end, the Proposed Amendment simply substitutes eligible DFS Priority Mail for First-Class Mail on a one-for-one basis and, for purposes of calculating the adjusted revenue threshold, imputes DFS’s average First-Class letter mail postage per-piece for each eligible Priority Mail piece. DFS will not receive a discount on its

Priority Mail volumes. *Id.* question 9. These changes are not sufficient to require the addition of a new product to the MCS.

C. Relationship among Priority, First-Class, and Standard Mail

The Public Representative argues that the Proposed Amendment conflates market dominant and competitive contribution, in a manner that could violate both 39 U.S.C. § 3622(c)(10)(B) and Federal antitrust laws. PR Comments at 11-12. The Public Representative's concerns are largely hypothetical, as they are the result of a scenario in which DFS's Priority Mail volumes constitute "a significant share of the market for 2-day parcel-shaped mail." *Id.* at 12. The Public Representative is concerned that the size of such a hypothetical share could allow the Postal Service to leverage its monopoly on First-Class and Standard Mail to provide incentives for DFS to use Priority Mail. *Id.* These concerns would be valid if supported by the facts of this docket; however, the facts vitiate the hypothetical.

The actual volume of Priority Mail that is likely to be involved in the Proposed Amendment is quite small. Historically, DFS's volume of Priority Mail has been low.¹⁶ The Postal Service and DFS anticipate that the volume of First-Class Mail that will shift to Priority Mail under the Proposed Amendment will be less than one percent of the current DFS Eligible First-Class Mail volume. Postal Service Response at 1, 9 ("an inconsequential volume of Priority Mail"; DFS Comments at 1 (the amount of Priority Mail "will have a *de minimis* effect on the NSA"). In contract year 1, the Postal Service reported that DFS's volume of Eligible First-Class Mail was approximately 228.5 million.¹⁷ Assuming a similar volume for contract years 2 and 3, this would mean that the Postal Service and DFS anticipate shifting less than 2.3 million pieces to Priority Mail under the Proposed Amendment.

¹⁶ See DFS Comments at 4, citing annual Priority Mail volumes of 219,757, 125,989, and 83,000 pieces.

¹⁷ Docket No. ACR2012-1, Annual Compliance Determination, Fiscal Year 2012, March 28, 2013, at 154.

Moreover, the Proposed Amendment is unlikely to result in the misuse of the Postal Service's monopoly. At the core of the prohibition on illegal tying arrangements under the antitrust laws, principally section 1 of the Sherman Act (15 U.S.C. § 1) and section 3 of the Clayton Act (15 U.S.C. § 14), is the idea that when a company links certain types of products in certain ways, competition is restrained.¹⁸

The Commission finds no evidence in this docket that the Postal Service has conditioned DFS's access to First-Class or Standard Mail services on the use of Priority Mail so as to constrain competition. As the Public Representative notes, under the Proposed Amendment, if DFS's First-Class Mail volume declines, DFS can still receive a rebate just by sending more Standard Mail. There is no requirement to send Priority Mail in order to receive the rebate—it is simply an optional method for meeting the adjusted revenue threshold. There is no evidence that the Postal Service coerced DFS into entering into the Agreement. DFS willingly undertook the obligation to send additional Standard Mail if its First-Class revenue declined in exchange for the promise of rebates. If the Agreement is no longer to DFS's advantage, DFS is free to terminate the Agreement (with notice) and resume sending First-Class and Standard Mail at generally applicable rates. Although the rates under the Agreement are available to other similarly situated mailers, other mailers are not required to enter into similar agreements in order to send First-Class or Standard Mail.

The parties negotiated this modification to preserve the essence of the Agreement (*i.e.*, to maintain DFS's contribution to institutional costs and promote volume growth) against the effects of DFS's "innovative experiment" in using Priority Mail to deliver a "specific type of plastic credit card to a new Discover customer." DFS Comments at 1-2. While the parties could have sought to modify the Agreement in different ways or opted to terminate it, they chose the Proposed Amendment. This

¹⁸ See, e.g., *Northern Pacific Railway Co. v. U.S.*, 356 U.S. 1, 6 (1958) and *International Salt Co. v. U.S.*, 332 U.S. 392 (1947). For products not covered by the statutory monopoly over letter mail, 39 U.S.C. § 409(e) waives any Postal Service claim of sovereign immunity from suit in Federal court for any violation of Federal antitrust laws. To the extent the Postal Service were to engage in alleged antitrust behavior, the Department of Justice and/or the Federal Trade Commission could sue to enjoin such action.

course preserves the essence of the Agreement and is not inconsistent with the principles cited by the Public Representative.

D. Cross-subsidization

The Commission is alert to the possibility that a product that includes both market dominant and competitive elements could violate the prohibition against using market dominant products to subsidize competitive products. 39 U.S.C. § 3633(a)(1). In this proceeding, no party contends that the Agreement, as amended, results in the cross-subsidization of Priority Mail by First-Class and Standard Mail. Additionally, the applicable Priority Mail rates satisfy section 3633(a)(2). Given this, and noting the attenuated link between competitive and market dominant products under the amended Agreement, the Commission finds that there is no indication that the Proposed Amendment would result in the subsidization of a competitive product by market dominant products.

E. Effective date

As filed, the Proposed Amendment did not specify an effective date. See CHIR No. 3, question 4; Valpak Comments at 5-7. Subsequently, the Postal Service clarified that the Agreement, as amended, would become effective only after Commission approval and would only apply to contract year 3.¹⁹ With that in mind, the Commission approves the Proposed Amendment, effective only for contract year 3.

F. Filing of the Proposed Amendment

The Proposed Amendment is the first amendment to a market dominant negotiated service agreement to be filed with the Commission under the Postal Accountability and Enhancement Act. Changes to negotiated service agreements are to be noticed with a formal pleading filed with the Commission. This practice enables

¹⁹ Response to CHIR No. 3, question 4 and question 1(a); USPS Response at 1. See also DFS Comments at 2 and 3 (expressing concern about the adjusted revenue threshold for contract year 3).

the Commission to provide notice of the filing and afford interested persons an opportunity to comment on it. The Postal Service routinely follows that procedure when filing amendments to competitive negotiated service agreements.²⁰ The Letter filed in this proceeding fell short of that standard.

As noted recently, the Commission intends to initiate a rulemaking to address filings, such as amendments to NSAs, that result in significant changes which may not fall under either 39 C.F.R. part 3020 subpart B or E.²¹ Until those regulations become effective, the Postal Service should adhere to the current practice of filing formal notice of amendments to negotiated service agreements.

G. Data Collection Plan

The Postal Service intends to require DFS to report the volume of First-Class Mail that shifts to Priority Mail under the Proposed Amendment, for verification by the Postal Service. Response to CHIR No. 3, question 9. Upon verification, the Postal Service will report the volume of DFS Priority Mail for contract year 3 to the Commission as part of its data collection plan report for that contract year. *Id.* question 7. The Postal Service is confident that it can use a separate permit number and either the Electronic Verification System or the Electronic Document System to “isolate the Priority Mail pieces that DFS will use to mail these credit cards and ensure that it is keeping an accurate accounting of the shifted volume to be credited to the DFS NSA.” *Id.* question 3.

Consistent with these representations, the Commission amends the data collection plan established under Order No. 694 to require the Postal Service to report the volume of Priority Mail used to calculate the adjusted revenue threshold for contract

²⁰ See, e.g., Docket No. CP2013-44, Notice of United States Postal Service of Amendment to Express Mail & Priority Mail Contract 12, with Portions Filed Under Seal, February 15, 2013.

²¹ Docket No. MC2013-44, Order No. 1703, Order Approving Minor Classification Change Concerning Certain Commercial Plus Pricing Categories, April 22, 2013, at 5; see also Docket No. MC2012-26, Order No. 1657, Order on Elective Filing Regarding Post Office Box Service Enhancements, February 14, 2013, at 23.

year 3. The Postal Service must also submit a description of the method it used to verify the volume shifted from First-Class to Priority Mail.

V. CONCLUSION

For the reasons discussed above, the Commission approves the Proposed Amendment. The Commission emphasizes that its analysis of substantive issues in this section is limited to the specific circumstances of this docket. As the Postal Service asserts, this docket should not be construed to “create a wide-ranging precedent” with respect to amendments to market dominant negotiated service agreements generally or with respect to other products that may involve both competitive and market dominant elements. Postal Service Response at 10.

VI. ORDERING PARAGRAPHS

It is ordered:

1. As set forth in the body of this Order, the Commission approves the Proposed Amendment, effective only for contract year 3.
2. Changes to the draft Mail Classification Schedule appear below the signature of this Order.
3. The data collection plan established under Order No. 694 is revised to require that the Postal Service report the volume of any Priority Mail used in the calculation of the adjusted revenue threshold for contract year 3 and submit a description of its method for verifying the volume shifted from First-Class Mail to Priority Mail.

By the Commission.

Shoshana M. Grove
Secretary

Part A – Market Dominant Products

1001 Market Dominant Product Descriptions

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1600 Negotiated Service Agreements

1601 Domestic

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1601.3 Discover Financial Services 1

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1601.3.3 Revenue Thresholds

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e. Adjusted Revenue Threshold

For every one dollar that Discover Financial Services, Inc.'s total eligible First-Class Mail postage for the current contract year falls below the total eligible First-Class Mail postage for the preceding year, the revenue threshold for the current contract year for all of Discover Financial Services Inc.'s total eligible mail will be adjusted upward by sixty-five cents. Any rebates received on the preceding year's First-Class Mail postage shall be excluded from the calculation of that year's total eligible First-Class Mail postage. For contract year 3, the total eligible First-Class Mail postage may include an amount that represents the revenue value of eligible First-Class Mail that Discover Financial Services, Inc. shifts to Priority Mail. The revenue value of the Priority Mail will be calculated by multiplying the volume of Priority Mail by the average postage per piece for eligible First-Class Mail for contract year 3.